U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 12 2010
SRC 06 263 51983

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and information technology consulting company. It seeks to employ the beneficiary permanently in the United States as a senior software engineer (applications) pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year U.S. bachelor's degree or foreign equivalent degree, the alternate educational level identified on the ETA Form 9089.

On appeal, [redacted] the petitioner's vice president, submits a letter and additional evidence. [redacted] states that the beneficiary has the equivalent of a U.S. bachelor's degree in business administration and he possesses more than four years of college level studies. [redacted] also states that the petitioner did not intend to require that a bachelor's degree had to be either from a single source or from a single college or university. [redacted] also asserts that USCIS assertion that the foreign equivalent degree to a U.S. bachelor's degree is and must be a four-year bachelor's degree is not based on the language of the regulations.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d

Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The beneficiary possesses a foreign three-year bachelor's degree in Commerce with a major in financial accounting and auditing from the University of Mumbai and a diploma from the Parle Tilak Vidyalaya Association's Institute of Management and Professional Studies in Mumbai, India.[2] Thus, the issue is whether the beneficiary's three-year degree is a foreign degree equivalent to a U.S. baccalaureate degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] The AAO notes that in Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is a Bachelor's degree in Computer Applications in 1998 from the Institute of Management and Professional Studies from Mulund College of Commerce, Mumbai, India. The petitioner submitted a copy of the beneficiary's three year diploma from the University of Mumbai in Commerce, with accompanying transcript, along with a copy of the beneficiary's Diploma in Business Management dated March 3, 1998 issued by the Parle Tilak Vidyalaya Association's Institute of Management and Professional Studies, Mulund (West), Mumbai, with an accompanying Statement of [redacted]. The record also contains copies of certificates from various computer training courses, including Wintech Computer for a 1999 course in numerous computer applications; Boston's Computer Institute for a 1996 computer course, and a Syspro Certificate of Merit for training in Internet, HTML, Java from April 7, 1997 to December 10,1998. However, the record contains no evidence that the beneficiary possesses a bachelor's degree in computer applications.

agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Contrary to [redacted] assertion, Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[3] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official

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[3] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). The record contains no evidence that Parle Tilak Vidyalaya Association's Institute of Management and Professional Studies is a college or university

In its response to the director's RFE, the petitioner submitted an academic evaluation report dated December 1, 2006 written by [redacted], Trustforte Corporation. Mr. [redacted] states that the beneficiary's Bachelor of Commerce diploma is equivalent to three years of academic study towards a U.S. baccalaureate degree in business administration. He further noted that the beneficiary's post-secondary program of study at the Institute of management and Professional studies was undertaken at an affiliate of the University of Mumbai. [redacted] listed the beneficiary's coursework in areas such as labor law, material management, advertising sales promotion and marketing research, and states that the beneficiary's completion of the post graduate diploma satisfies the academic requirements for a bachelor's level concentration in the field of business management and that the beneficiary has the equivalent of a bachelor of Business Administration degree from an accredited U.S. college or university. [redacted] also notes the beneficiary's certificate training in the computer field but assigns it no university level equivalency.

On appeal, counsel submits an additional evaluation written by [redacted] Zarb School of Business, Hofstra University. [redacted] states that based on the beneficiary's three year bachelor of commerce degree and his subsequent advanced post secondary program in business management at the Institute of Management and Professional Studies, the beneficiary has the functional equivalent of a U.S. Bachelor of Business Administration degree with a concentration in Business Management. [redacted] adds that the beneficiary's academic background is beneficial for employment in technology or business positions.

The AAO notes that these two evaluation reports are in conflict. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

In determining whether the beneficiary possessed a U.S. bachelor's degree in any of the fields stipulated on the ETA Form 9089 or a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides a great deal of information about the educational system in India, and while it confirms that a bachelor of commerce degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate. (See enclosed excerpts from EDGE.)

EDGE discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provide:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

As stated previously, the record does not reflect that Parle Tilak Vidyalaya Association's Institute of Management and Professional Studies program is approved by the AICTE. Further, where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b),

> 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree in computer science and 36 months (3 years) of experience in the job offered with the following alternate fields of study: "engineering, Info systems, Comp Applications or related." Part H Item 8 indicates that the employer will accept a bachelor's degree in the same fields of study with 60 months (5 years) of work experience as an alternative. Item 14 of Part H did not reflect any specific skills or other requirements.

The AAO further notes that the beneficiary's statement in the ETA Form 9089 that he had a bachelor's degree in computer studies is not established by the record. The AAO also notes that although the petitioner indicates "or related" in the fields of study included on the ETA Form 9089, the coursework undertaken by the beneficiary in business administration does not appear related to the stipulated fields of study on the ETA Form 9089, namely, computer science, engineering, information systems, computer applications or related. The beneficiary's third year Statement of [redacted] does not indicate any coursework in computer science, engineering, information systems, or computer applications, and his master's level studies only include one course on management information systems. The record does not reflect that the beneficiary's postsecondary studies are in a field related to the above-identified fields. Further the record reflects that none of the computer applications training received by the beneficiary was at a university level. Thus the AAO determines that neither the beneficiary's three-year baccalaureate degree nor his postgraduate secondary studies are in any of the fields stipulated on the ETA Form 9089. This by itself is sufficient to deny the instant petition.

Beyond the director's decision, the AAO has identified additional grounds of ineligibility.

As noted previously, the ETA Form 9089 set forth the following alternative educational requirements: a bachelor's degree plus five years of experience in the fields of engineering information systems, computer applications or "related." The proffered position requires three years of experience if the beneficiary demonstrates his master's degree, or five years of experience if the beneficiary holds a U.S. bachelor's degree or a foreign equivalent.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted on December 13, 2005. The AAO would question whether your organization has established that the beneficiary has the requisite five years of progressive experience prior to the 2005 priority date.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The petitioner submitted letters of work verification that include both work the beneficiary performed as a programmer analyst working with [redacted], New York, from October 2002 to August 2004; and with [redacted], Jamaica, New York, dated October 25, 2002. This latter document does not indicate the period of time that the beneficiary worked for this company; although it states his job duties were in the computer applications field, working with many programs. The AAO notes that the Form ETA 9089 indicates the beneficiary worked at [redacted]. from January 12, 2000 to October 25, 2002. However, the letter from

Novara Comp Services does not corroborate this employment. The employer's letter and the ETA Form 9089 are inconsistent. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

A third letter from [redacted] India dated October 4, 1999, states that the beneficiary worked for the company during April 1999 to September 1999 as its Technical Marketing Executive and that the beneficiary concentrated on website design and development. The ETA Form 9089 also indicated that the beneficiary worked for the petitioner from August 2004.[4]

The petitioner did not describe the petitioner's length of employment or corroborate the beneficiary's statements in the ETA Form 9089. The petitioner described the beneficiary's work with Clearship Infotech as working in a "software engineering" capacity which does not directly correlate with the technical marketing job duties that the Clearship Infotech director describes. Although the petitioner referred to other jobs held by the beneficiary in its cover letter, the record contains no additional letters of work verification to further corroborate the beneficiary's prior work experience. Either based on omission of information or inconsistent information, the AAO finds the beneficiary's qualifying work experience to be his one year and ten months with Compu-Solve, Inc. The record does not contain sufficient regulatory-prescribed evidence of the beneficiary's requisite experience.

Further the AAO finds that the petitioner has not established its ability to pay the proffered wage in the instant matter. The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The priority date in the instant case is December 13, 2005, and therefore, your organization must establish the ability to pay the beneficiary the proffered wage from tax year 2005. Your organization did not submit its 2005 tax return and therefore, the AAO cannot determine whether your organization established its ability to pay the proffered wage from the priority date in 2005 to the present. Review of your organization's federal tax returns for 2006 in the record reveals that your

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[4] The AAO notes that the beneficiary did not sign the ETA Form 9089 prior to the submission of the form to USCIS, which is considered another factor to be considered in the dismissal of the petition.

organization had net income[5] of $1,842,900[6] in 2006 which was sufficient to pay the beneficiary the proffered wage of $70,000 that year and thus your organization established the ability to pay the proffered wage for 2006. Your organization submitted reviewed financial statements for the years ending December 31, 2003 and 2004; however, the priority date is 2005 and earlier financial documents would not be dispositive of the petitioner's ability to pay the proffered wage in 2005 and 2006. Further, the regulation at 8 C.F.R. § 204.5(g)(2) stipulates that financial statements must be audited.

According to the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate the ability to pay the proffered wage until the beneficiary obtains lawful permanent residence. The instant petition is pending with the AAO and the beneficiary has not obtained his lawful permanent residence yet. Therefore the petitioner failed to establish its ability to pay the proffered wage for 2005 through an examination of wages paid to the beneficiary and the net income[7] or net current assets.[8]

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[5] If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.

[6] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf; Instructions for Form 1120S (2002), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf.

[7] If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

[8] Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net

In addition, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). USCIS computer records reflect that the petitioner has filed over 2000 immigrant and non-immigrant employment-based petitions, many of which were filed in the relevant period of time. If these positions are for similar jobs with similar wages, the petitioner has to establish its ability to pay the wages of all pending petitions filed within the relevant period of time.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification, both in terms of fields of study and work experience. Further, the AAO finds that the petitioner has established its ability to pay the proffered wage. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.